U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 22 July 2005

CASE NO.: 2004-LHC-2411

OWCP NO.: 07-167501

IN THE MATTER OF:

MINH Q. VO,
Claimant

v.

ARCHER DANIELS MIDLAND CO.,
Employer

APPEARANCES:

Anh Quang Cao, Esq.,
On behalf of Claimant

Alan G. Brackett, Esq.,
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901 *et. seq.* (2000) brought by Minh Q. Vo (Claimant) against Archer Daniels Midland Company (Employer). The issues raised by the parties could not be resolved administratively and the matter was

referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on April 29, 2005, in Metairie, Louisiana.

At the hearing both parties were afforded the opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs in support of their positions. [1] Claimant testified, called Dr. Thanh Pham and introduced 14 exhibits, of which 10 were withdrawn and one was rejected. The three exhibits admitted included: background information on cervical radiculopathy and carpal tunnel syndrome, and correspondence from Lamoine Ward. Employer called Richard Moody, Taylor Galiano and Mark Bartlett, and introduced 15 exhibits, which were admitted, including: various Department of Labor filings; Employer's payroll records of Claimant's wages; Employer's incident investigation guide; medical records of Charity Hospital and Drs. Kotler, George, Jaffri, Steck, Nguyen, Vu and Pham.

Post-hearing briefs were filed by the parties.[2] Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. An accident occurred on March 26, 2003;

2. An employer-employee relationship existed at the time of Claimant's accident;

3. Employer was advised of the accident on March 26, 2003;

4. Employer filed a Notice of Controversion on August 18, 2003;

5. An informal conference was held on October 9, 2003; and

[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX __, p.__; Employer exhibits- EX __, p.__; Joint exhibits- JX __, p.__.

[2] Claimant submitted a 15-page, double spaced brief on June 22, 2005. Employer submitted a 14-page, double spaced brief on June 22, 2005.

6. Claimant's average weekly wage at the time of injury was $649.74;

II. ISSUES

The following unresolved issues were presented by the parties:

1. Fact of accident;

2. Medical causation; and

3. Nature and extent of disability.

III. STATEMENT OF THE CASE

A. Chronology

Claimant was born in Vietnam where he lived for 33 years, working as a military nurse for more than 10 years, until 1975. Claimant fled to the United States in 1975, living in San Francisco, Corpus Christi, Texas, and Spokane, Washington before settling in New Orleans in 1978 or 1979. Claimant's pre-Longshore employment included jobs at Popeye's fast food restaurant, J.C. Penney and Schwegmann grocery stores. About 1979, Claimant worked as a tacker, welder and ultimately pipe welder at the former Hunt's Shipyard near Boomtown until he was laid off in 1983. Claimant then worked as a helper on a shrimping boat before finding work as a welder at Employer's shipyard in 1997.

Claimant worked at Employer from June 1997 until August 2003. He started as a welder II, was promoted to welder I and occasionally worked as a fitter when they needed him. He was then promoted to lead man for two years, supervising other fitters and welders and reporting to people in the office. He was transferred back to a fitter/welder through a reduction in force at Employer's shipyard. Claimant was injured on March 26, 2003, when his shirt sleeve got caught on a 50-pound scaffold board as he was passing it through a manhole up to his co-worker, Lamoine Ward. Claimant reported to his supervisors that he cut his right forearm and hand, and an accident report was filled out on that day.

Claimant treated with Dr. Kotler the following day, March 27, 2003, who diagnosed him with a hand injury. At his follow-up visit, Claimant complained of swelling and numbness in his right hand, so Dr. Kotler referred him to hand surgeon Dr. George who ordered EMG nerve conduction studies. These studies were initially negative and Dr. George noted Claimant's hand markedly improved, but after Claimant's complaints of swelling and numbness persisted, follow-up studies were conducted on June 24, 2003, revealing acute radiculopathy in Claimant's cervical spine. Both doctors released Claimant to regular duty work with no restrictions.

Claimant next treated with chiropractor Nick Nguyen on July 25, 2003, complaining of neck and shoulder pain which he reported began two days earlier. Claimant filed his LS-203 in the present case on July 28, 2003, indicating that in the March 26, 2003 accident he fell back and injured his neck and back, as well as his forearm. In August, 2003, Claimant started seeing chiropractor Thanh Pham, who treated him on a continual basis through December 2004. Dr. John Steck, a neurosurgeon, evaluated Claimant in March and April of 2004 and noted that a cervical MRI showed only degenerative disc bulging and mild stenosis in Claimant's cervical spine not sufficient to cause his radiculopathy. Dr. Steck stated Claimant did not have a significant spinal injury, did not require work restrictions and did not need further medical treatment.

Claimant returned to work following his accident until August 4, 2003, when he stopped reporting to work. He was terminated in November, 2004, based on Employer's policy to terminate workers who are inactive for one year.

B. Claimant's Testimony

Claimant testified through the use of an interpreter who, although she is not a professional interpreter nor has been officially qualified to interpret in court proceedings, was permitted to translate for Claimant in the current proceedings. (Tr. 76-82).

Claimant testified that while in Vietnam, he was never wounded in military action, and the only heavy duty part of his job was helping patients get around. Additionally, his non-Longhsore jobs in the United States were light duty; he has never experienced any work-related accidents or injuries. (Tr. 82-92).

Claimant testified his family physicians are Dr. Truyen Vu and Dr. Nick Nguyen. He first treated with Dr. Truyen Vu in 1982 for a cold or aching, a cough

or flu. He stated that if his medical records indicated he was treated for problems in his right shoulder in 1993, it was pain secondary to his cold. Claimant last saw Dr. Truyen Vu in 2002; he never treated with Dr. Truyen Vu for pain or numbness in his neck, arms or legs. (Tr. 92-95). Claimant further testified he treats with Dr. Nguyen only for colds, cough and the flu. He went to Dr. Nguyen after his accident in August, 2003, but was only given painkillers and told to leave. (Tr. 96). On cross-examination, Claimant stated he would not dispute that he visited Dr. Truyen Vu in July, 1990, for right shoulder pain. (Tr. 119).

Claimant testified that when he worked as a leadman at Employer, a supervisor helped him with the reporting due to his limited English capabilities. Claimant testified that sometime within the first three years of his employment he suffered an injury to his wrist, though he could not remember which one. He sought medical treatment, but could not recall the doctor who evaluated him or any other details surrounding the incident. He did state that the pain subsided after one or two days after which he returned to his regular job. (Tr. 96-98, 117-19). Claimant did not remember injuring his right wrist in February, 2003, or treating with Dr. Pham for this injury. (Tr. 119).

Claimant's only other accident at Employer was the one in March 2003 which precipitated the present claim. He was working in the stern of a ship, helping his co-worker, Black, lift a piece of metal up; specifically, Claimant testified he "gave that long piece to the man [Black] on top." When Black pulled the piece of metal, the button of Claimant's jean jacket sleeve got caught and Claimant was pulled up. Claimant yelled to Black that his hand was being pulled up, but Black simply moved the sheet of metal to one side, causing Claimant to lose his balance and "hit the di-angle (sic) on the side." (Tr. 98-99). On cross-examination, Claimant testified the board he was lifting up weighed about 50 pounds, and he weighed approximately 140 pounds at the time of the accident. He clarified that when his arm was pulled up, he felt as if he was lifted off of the ground, but it only lasted one or two seconds before he hit the ground and fell back. However, Claimant previously testified at his deposition that he was lifted right off the ground. (Tr. 121-24).

Claimant testified he cut his right arm which was bleeding and swelling; additionally, the right side of his face was numb. He then testified he struck his right shoulder near his collar against an angle iron. At the beginning, Claimant did not know he injured his neck, though later he experienced pain and was told he had an injury in the area of his neck and right shoulder. Claimant stated the numbness worsened in the week following the accident; when he went to the doctor,

Claimant told him the whole right side of his body was numb. (Tr. 99-102). At the time of his accident, Claimant was scared and in pain; he told his employer he was hurt and they gave him an ice compress. Additionally, he did not have an interpreter present to assist him in describing his symptoms. (Tr. 102, 131). On cross-examination, Claimant testified his right arm went immediately numb, and that he told Employer this, but only received an ice compress. (Tr. 126-27).

Claimant testified Dr. Kotler was the company doctor and although he wanted to see the doctor the same day, Employer told him to wait until the next day. After two visits he was referred to a hand doctor, Dr. George. Claimant testified Dr. George performed EMG studies and informed him there was a problem with his nervous system. Claimant treated with Dr. George for three or four months, though his symptoms did not improve. Claimant next treated with Dr. Nick Cong (sic), a chiropractor who helped ease Claimant's pain prior to his getting an MRI, as recommended by Dr. George. (Tr. 103-08, 128). After this, Claimant ran out of money but he treated with Dr. Thanh Pham, who said he would treat Claimant for free, starting in October, 2003. Claimant testified he received short term relief from Dr. Pham's treatments. When Claimant's pain increased, he sought treatment at Charity Hospital in New Orleans. Claimant was also evaluated by Dr. John Steck as well as a doctor at Diagnostic Imaging Services. (Tr. 108-11).

Claimant started going to Charity Hospital in September or October 2004; he treated there a total of seven or eight times. Claimant received pain medication and underwent an MRI of his neck, which he was told revealed a spinal injury. Claimant was told he had to have surgery on his arm and wrist, though no such surgery has been scheduled. (Tr. 111-15).

Claimant testified that following his accident he did not perform his regular job duties, but worked as a fire watchman, a light duty position, until he was ultimately discharged by Employer in August, 2003; he has not received any worker's compensation benefits. Claimant testified Employer allowed him to work in light duty jobs and Dr. Kotler released him to work light duty. He did not seek subsequent employment secondary to the pain in his right shoulder and neck, and because he is unable to use his right arm. On re-direct, Claimant testified he submitted applications for a security guard position and within the Vietnamese community, but nobody hired him. (Tr. 115-17, 133).

Claimant testified he cannot close his right hand all the way, cannot lift heavy things, cannot look up or down extensively and cannot drive very far.

Claimant is right handed. He testified he currently suffers numbness from his arm up to his shoulder; he never had these symptoms prior to his accident at Employer. (Tr. 128-29). On cross-examination, Claimant testified he applied for and received unemployment benefits for six months on the basis that he was able and willing to work light duty jobs. Additionally, he clarified he is able to mow his lawn, drive his children to school and go grocery shopping with his wife. (Tr. 129-30).

C. Testimony of Thanh Pham, D.C.

Dr. Pham is a chiropractor who has practiced for five years; he treats a variety of injuries related to the spine and nervous system, including those which could radiate down a person's extremities. Dr. Pham testified he first evaluated Claimant on August 13, 2003, for neck pain and numbness radiating down to his right hand secondary to an accident at work. In relaying a description of Claimant's work accident, Dr. Pham testified Claimant was helping a co-worker lift a heavy item, with the co-worker pulling from above and Claimant pushing it from below. Claimant's co-worker yanked the item too hard, causing Claimant to lose his balance and fall, thus injuring his neck. Dr. Pham testified Claimant's symptoms were consistent with this type of accident; specifically, yanking an arm into the air can cause injury by stretching the nerves as well as resulting in a blow to the neck upon falling. He diagnosed Claimant with cervical nerve root irritation. (Tr. 40-46).

On cross-examination, Dr. Pham testified if Claimant did not strike his neck in the fall, it would change the mechanism of the injury, but not his opinion regarding causation. (Tr. 64). When presented with the reports of Dr. Nick Nguyen, another chiropractor, indicating Claimant's neck pain did not begin until July 23, 2003, Dr. Pham testified he could not relate the pain to Claimant's March 26, 2003 work accident. He acknowledged that Claimant's complaints of neck pain were consistent with the accident description Claimant provided, but Dr. Pham never knew when the accident took place. (Tr. 64-66).

Dr. Pham testified that although he is not a neurosurgeon or orthopedic surgeon, he diagnoses his patients based on his own examination. He stated he would welcome a second opinion from a neurosurgeon or orthopedic surgeon, but it would not change his own diagnosis. (Tr. 59-60). Additionally, Dr. Pham explained he uses MRI studies in his diagnoses of patients; he is qualified to read and understand MRI reports, though not the films themselves. In Claimant's case, Dr. Pham ordered a cervical MRI which revealed a protrusion, prompting him to

refer Claimant to a neurologist. He added that MRI tests are not conclusive of a patient's medical condition. (Tr. 69-70, 73-74).

On cross-examination, Dr. Pham testified August 13, 2003, was not the first time he treated Claimant; he first saw him approximately 1.5 to 2 years prior to that date. Dr. Pham confirmed, per his medical records, that he treated Claimant on February 18, 2003, but he was not aware that this appointment was just one month before Claimant's work accident. Dr. Pham's note from February 13, 2003, indicates he treated Claimant for complaints of the left shoulder and chronic problems with the right wrist. Dr. Pham noted the wrist pain was severe and constant, and could have been from Claimant's work hammering sheet metal. (Tr. 61-62). Dr. Pham maintained that this treatment did not discredit his deposition testimony that he never treated Claimant for any problem on his right side, Claimant merely complained of right wrist pain. However, Dr. Pham then acknowledged his treatment form from that visit showed Claimant was treated for his left shoulder and right wrist. (Tr. 62-63).

Dr. Pham treated Claimant from August 13, 2003, until February 14, 2005, during which time Claimant's pain levels improved from an 8 or 9 out of 10 down to a 3 out of ten. However, despite this improvement, Dr. Pham noted his treatment reached its maximum point of effectiveness on Claimant, prompting Dr. Pham to talk with Claimant's attorney and the District Director about having Claimant evaluated by a neurologist. Dr. Pham testified he did not discharge Claimant, because he wanted to find him another doctor who could help him. However, Claimant stopped making appointments because he could not pay for them. (Tr. 46-47).

Dr. Pham testified cervical radiculopathy is pain radiating from a specific nerve root in the neck; in Claimant's case, his pain radiated from C6 nerve root. Dr. Pham treated him with cervical chiropractic manipulations to take pressure off of the nerves. (Tr. 48). Claimant incurred a total of $13,650.00 in medical bills from Dr. Pham, which were not paid as of the formal hearing; however, Claimant attempted to pay him with fruit. (Tr. 58). On cross-examination, Dr. Pham testified he never opined as to Claimant's ability to work, because Claimant was not working at the time of his treatment. (Tr. 67).

D. Testimony of Richard Moody

Mr. Moody was the manager of Employer's New Orleans shipyard during the period of Claimant's employment there, including March, 2003, when Claimant

sustained the aforementioned accident. Mr. Moody testified that Claimant was promoted from fitter/welder to a lead man because he was capable of leading both Vietnamese and non-Vietnamese workers. He was put back to work as a fitter/welder during a downsizing of the company. Claimant's language skills were a factor considered in his promotion, and Mr. Moody testified Claimant was able to speak and understand English with English-speaking employees. Specifically, Mr. Moody testified he has spoken English with Claimant and, although Claimant's English was not as clear as some, he had no problems understanding Claimant. (Tr. 137-39).

Mr. Moody verified that EX-5 establishes Claimant continued to work at Employer after March 26, 2003, and EX-6 represent the vacation pay paid to Claimant after March 26, 2003. Mr. Moody clarified that upon his termination, Claimant was erroneously paid his vacation pay a second time. Mr. Moody further testified Claimant was ultimately terminated from Employer, per company policy, on the basis that he was inactive for twelve months. Mr. Moody was aware Claimant under a doctor's care during his period of inactivity. (Tr. 139-40, 145).

Mr. Moody testified he was aware Claimant sustained an accident wherein he scraped his forearm/wrist area; Claimant never relayed an injury to his neck or any other part of the body. Mr. Moody stated the board Claimant was helping Mr. Ward lift was solid oak and probably weighed 50 to 60 pounds; Mr. Ward, additionally, was a man of medium build, approximately 5'8" and 160-170 pounds. Mr. Moody further testified that workers typically did not lift anything more than 40 or 50 pounds without having assistance; he never saw Mr. Ward lift the equivalent of 200 pounds. (Tr. 140-42).

On cross-examination, Mr. Moody testified Claimant was a good worker who, to his knowledge, had never lied to him. Mr. Moody did not witness the aforementioned accident, draft the accident report, and he was not present when the report was filled out. (Tr. 143). Based on the accident report, Mr. Moody explained that at the time of the accident Claimant was in a confined area of a barge, which was twelve feet high. He was lifting a board through a man way that was only 18" in diameter; Mr. Ward was on the deck above and lifted it straight up out of the hole. There were only two or three inches of space on each side of the board as it was lifted through the manhole; because of the tight space, Mr. Moody testified there was no room to shift the board from side to side or even yank the board. (Tr. 144-45).

E. Testimony of Taylor Galiano

Mr. Galiano has been the safety representative for Employer's New Orleans shipyard for the past 14 years, including March, 2003, when Claimant sustained the present accident. Mr. Galiano testified Claimant was a fitter/welder at the time of his accident. He knew Claimant as a lead person and as a fitter/welder and had the opportunity to speak English with Claimant "quite often." (Tr. 146-47). However, he was not Claimant's supervisor. Mr. Galiano's duties included inspecting barges, checking them for oxygen content, making sure employees wore proper safety equipment and looking for faults throughout the shipyard. (Tr. 151).

Mr. Galiano filled out the accident report for Claimant's March 26, 2003 incident that same day; although he did not witness the accident, he received the information from directly from Claimant, who spoke to him in English. Mr. Galiano testified Claimant's English is broken, but he was able to understand that Claimant injured his forearm. Claimant never indicated to Mr. Galiano that he injured his shoulder or neck, or that he was lifted off of the ground during the accident. Additionally, Mr. Galiano did not recall Claimant asking to see a doctor the day of his accident; Employer's policy is to let injured employees see a doctor when they ask to. However, Claimant received first-aid on his forearm prior to filling out the accident report. (Tr. 148-50, 152-53, 161). Mr. Galiano testified he filled out the first page of the report based on what Claimant told him; Claimant signed off on the report after reading it. The second and third pages, however, would have been filled out by Claimant's supervisor or the safety man. (Tr. 158-59).

Mr. Galiano further testified a scaffold board weighs about 50 pounds. He knows Mr. Ward and stated that no worker at the shipyard was required to lift more than 50 pounds without assistance. He never saw Mr. Ward lift upwards of 200 pounds. (Tr. 150-51). Mr. Galiano also testified he understood Claimant hit his hand on either the scaffold board or the ladder on side of the barge while trying to lift the board through the manhole. He did not recall noticing anything different about Claimant the following day at work. (Tr. 154).

F. Testimony of Mark Bartlett

Mr. Bartlett is a claims adjuster for Employer; he handled Claimant's claim for worker's compensation benefits. He testified Claimant was not paid any indemnity benefits following his March 26, 2003 accident because he did not miss any work until he voluntarily left in August, 2003. Employer did, however, pay

Claimant's medical bills from Dr. Kotler, Dr. George, Dr. Jaffri and Dr. Steck. Claimant, however, never sought authorization himself or through his attorney to receive treatment from Dr. Katz, Dr. Pham or Charity Hospital. (Tr. 163-64). Mr. Bartlett further testified Claimant had two workers' compensation files with Employer; he did not recall if he worked on the first one. (Tr. 166).

G. Claimant's Medical Records

Claimant's medical records from his family physician, Dr. Truyen Vu, include six visits between July 21, 1984 and July 13, 1998, where Claimant presented with complaints of back pain. In 1985 he was diagnosed with low back pain and muscle spasm. On November 20, 1985, Claimant complained of pain in his right arm. Additionally, on July 13, 1998, Claimant complained of pain in his right shoulder. (EX-12, pp. 1-7). On February 18, 2003, one month prior to his work-related accident, Claimant treated at Family Chiropractic for chronic pain in his left shoulder, left arm and right wrist. The chiropractor who treated him indicated Claimant's job, which required him to constantly hammer a metal sheet, could have caused his pain. (EX-13, p. 1).

On March 27, 2003, Claimant presented to Dr. Kotler with several small scratches on his right forearm as a result of pinching his right arm and hand between a wooden board and a wall at work the day before. Dr. Kotler indicated Claimant had an injury to his right wrist, but released him to work without restrictions. (EX-7, pp. 2-3). At Claimant's follow-up appointment on March 31, 2003, Claimant complained of pain in his right wrist with a weak hand grip, swelling and numbness. Dr. Kotler stated Claimant could perform his regular duties; his opinion was unchanged at Claimant's April 3, 2003 follow-up appointment. (EX-7, pp. 4-7).

Dr. Kotler referred Claimant to Dr. George, a hand surgeon, who evaluated him on April 3, 2003. Dr. George noted Claimant suffered a compression injury to his hand/forearm, which caused him to jerk backwards, and a physical examination revealed maximum tenderness at the MP joint of Claimant's index finger. Dr. George diagnosed Claimant with medical epicondylitis with cubital tunnel syndrome and MP joint strain in the index finger. He prescribed Darvocet, recommended Medrol Dosepak and selective finger injections but released Claimant to work without restrictions. (EX-8, p. 1). Dr. George evaluated Claimant again on April 21, 2003, noting his finger was markedly improved. However, since Claimant still experienced paresthesis in the cubital tunnel he

ordered a nerve conduction study. Dr. George kept Claimant at regular work duties without restrictions. (EX-8, p. 2).

Dr. Jaffri, an electromyographer, performed an EMG nerve conduction study on Claimant on April 29, 2003. The study revealed no left focal, right ulnar or median nerve entrapment. (EX-9, p. 1). On May 22, 2003, Dr. George noted the EMG/NCS was negative for entrapment neuropathy. He opined Claimant had muscle weakness in his right upper extremity, for which he recommended physical therapy; Dr. George released Claimant to his regular work with no restrictions. (EX-8, pp. 3-4).

On June 12, 2003, Dr. George noted Claimant exhibited classic paresthesis into hands with diminished response of the ulnar nerve. He referred Claimant to Dr. Jaffri for a consult and released him to full duty work. (EX-8, p. 6). Dr. Jaffri performed a second EMG/NCS on June 24, 2003, which revealed acute radiculopathy of C6-7; he strongly recommended further imaging studies. (EX-9, p. 2). On July 2, 2003, Dr. George noted the EMG/NCS was positive for C6-7 radiculopathy which correlated with his clinical findings. He referred Claimant to Dr. Robert Steiner; however, there is no record of Claimant ever treating with Dr. Steiner. (EX-8, p. 7). On July 17, 2003, Dr. Kotler issued a written opinion stating that the pathology of Claimant's right upper extremity problems was an abnormality at the C6-7 joint in his neck. However, he acknowledged the only injury Claimant sustained on March 26, 2003 was to his right hand/forearm. (EX-7, p. 8).

Claimant presented to chiropractor Nick Nguyen, on July 25, 2003, with complaints of pain in his neck and shoulder, and numbness and tingling in his right arm which was aggravated with lifting. He informed Dr. Nguyen he injured his right arm and experienced immediate pain, swelling and pins-and-needles sensation for which he received an ice compress. Claimant rated his pain a six out of ten, interfering with his work and sleep. Dr. Nguyen noted, however, that Claimant's neck pain had only begun two days before, on July 23, 2003. (EX-11, pp. 4-6). Claimant then treated with chiropractor Pham from August 4, 2003 through December 6, 2004. At his initial evaluation, Claimant complained of pain and numbness in his neck, shoulder, arm, hand and elbow. He described his pain as constant and rated it a nine out of ten; nothing relieved his pain and it had been ongoing for months. Dr. Pham indicated the onset of Claimant's pain was March 26, 2003, when he experienced a falling accident at work. On October 13, 2003, Claimant told Dr. Pham his accident caused him to fall back, strike his neck against the angle iron and cut his wrist. Claimant informed Dr. Pham he

experienced numbness in his neck and hand immediately. (EX-15, pp. 35, 45, 112). On December 29, 2003, Dr. Pham released Claimant to light duty work with frequent bending, stooping and no climbing. (EX-15, p. 116).

Claimant was evaluated by Dr. John Steck, a neurosurgeon, on March 4, 2004. He presented with pain in his neck radiating to his right forearm and numbness in his right hand. Dr. Steck noted that in the March 26, 2003 accident, Claimant's right forearm was trapped and he then fell backward and struck his right upper back on the side of the barge. Claimant told Dr. Steck he developed numbness in his right face, right shoulder and down his arm which lasted more than six months. (EX-10, p. 4). Upon physical examination, Dr. Steck indicated Claimant had normal muscle strength in his upper and lower extremities, normal reflexes, decreased pin prick in C7 distribution, normal range of motion of the cervical spine and a negative Spurling's maneuver. He noted Claimant may have a cervical injury which may be related to his accident. (EX-10, p. 5). A cervical MRI taken April 12, 2004, revealed degenerative changes at C3-4, 5-6 and 6-7 with mild stenosis at C5-6. Dr. Steck noted there was no evidence of disc herniation or anything which would cause Claimant's complaints of radiculopathy. Overall, he opined Claimant did not suffer a significant spinal injury; he released Claimant to his regular work and did not recommend further treatment. (EX-10, p. 1).

Claimant next presented to Charity Hospital in New Orleans on October 6, 2004, with complaints of neck and right arm pain. He was diagnosed with spondylosis of the cervical spine and neuropathic pain in his right upper extremities. The doctor noted an EMG showed an old right C6 radiculopathy. (EX-14, pp. 11, 17). Claimant returned to Charity on October 25, 2004, with complaints of neck pain radiating into his right arm. On November 24, 2004, he presented with right arm pain and on November 27, 2004, he was diagnosed with low back pain secondary to a lumbar MRI. (EX-14, pp. 6, 8, 22, 24). Claimant underwent an EMG at Charity on January 6, 2005, which revealed chronic L5-S1 radiculopathy. On March 28, 2005, he was treated at Charity for right arm pain. (EX-14, pp. 2-3).

H. Claimant's Exhibit

Claimant introduced a written statement of Lamoire Ward, his co-worker, which was dated March 26, 2003, the day of Claimant's work accident. Mr. Ward noted that as he pulled the scaffold board up through the manhole, the banding

strap on the board caught hold of Claimant's shirt sleeve button and jammed his arm against the angle iron. (CX-5).

I. Employer's Exhibits

Employer's exhibit 3 contains a series of medical leave slips, indicating Claimant missed work on eight occasions between August 1997 and October 1999 for treatment with Dr. Thuy Nguyen. (EX-3).

The incident investigation performed by Employer following Claimant's March 26, 2003 accident states that Claimant's shirt sleeve button caught on the scaffold board as he was lifting it up to his co-worker, pinching his right arm. Claimant received first aid for his injuries to his wrist. (EX-4). After this accident, Claimant received $12,939.46 in wages at Employer. (EX-5).

In his claim for compensation, dated July 28, 2003, Claimant stated "a button of right long sleeve of my jean jacket stuck with steel cover of mantelboard, and my whole body hit the angle; my hard hat and safety glass fallen down the floor. I was feeling numbness the whole right arm from the hand to the shoulder." He indicated he experienced pain and numbness in his neck, right arm and elbow, as well as bleeding on his wrist and hand. (LS-203). Claimant last worked at Employer on August 4, 2003, at which time he informed Employer his physical condition prevented him from performing his work duties. He was terminated on November 29, 2004, secondary to his inactive status for one year and twelve weeks. Claimant received $486.39 for 31 hours of vacation pay on December 9, 2004. (EX-6).

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends he suffered compression injuries to his right arm, elbow and the base of his neck as a result of his March 26, 2003 accident at Employer. Claimant asserts the discrepancy in descriptions of the accident is the result of his broken English and difficulty communicating with his superiors. Claimant specifically argues his C6-7 radiculopathy as diagnosed by Drs. Jaffri and George is the result of his work accident, as he had no pre-existing cervical condition and no doctor indicated it was the result of degeneration. Claimant argues he presented a prima facie case for causation, which Employer failed to rebut. He further

contends that his treatment with Dr. Nguyen, Dr. Pham and at Charity Hospital was reasonable and necessary to relieve his pain, thus he should receive medical benefits under Section 7 of the Act. Claimant further contends he is entitled to permanent total disability benefits, arguing he reached MMI on May 3, 2004 per Dr. Steck's note and is prevented from performing his duties as a welder secondary to the pain in his right arm and neck.

Employer does not contest Claimant suffered an accident at work on March 26, 2003 in which he suffered minor injuries to his right forearm and wrist. However, Employer contends there is no causal link between this accident and Claimant's neck and back problems. Employer asserts Claimant and Dr. Pham are not credible witnesses, as their testimonies contained inconsistencies and contradictions within their hearing testimony and vis-à-vis fact witnesses and medical records. Specifically, it argues that Claimant, who is able to communicate in English, only reported minor scrapes as a result of the accident; he never indicated that he hit his upper back or suffered numbness and tingling on March 26, 2003. Overall, Employer argues the totality of the credible evidence indicates Claimant did not injure his neck on March 26, 2003; thus, Claimant's claim should be denied. In the alternative, Employer contends Claimant should not receive medical benefits for the treatment he sought from Dr. Nguyen, Dr. Pham and Charity Hospital because Claimant never sought authorization for said treatment.

B. Credibility Findings

Employer contends both Claimant and Dr. Pham are incredible witnesses as evidences by their inconsistent testimonies. Employer highlighted several instances in the hearing transcript where Claimant contradicted himself, his prior testimony or the other evidence in record and did the same for Dr. Pham, as well. It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999). Additionally, a "[c]laimant's lack of candor in peripheral areas of testimony does

not render his testimony incredible, . . . does not deprive of substantial evidentiary support the administrative law judge's holding in reliance on that testimony as well as the more relevant medical testimony, and does not make the holding 'inherently incredible or patently erroneous.'" *Pernell, v. Capitol Hill Masonry*, 11 BRBS 532 (1979)(*quoting Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978)).

I note there were several points in Claimant's testimony where he contradicted his prior hearing or depositional testimony, or the rest of the record. Specifically, Claimant testified that prior to his accident he only treated with his family doctors for cold and flu symptoms. However, Claimant's medical records contained at least a dozen instances where he was treated for back pain, and at the hearing Claimant could not dispute he was treated for right arm and right shoulder pain in the 1990s. Claimant could also not recall a chiropractic treatment he received for his left arm and right wrist just one month before his accident.

Claimant's testimony was inconsistent and contradictory on major issues such as the description of his accident and symptoms, as well as his medical history. I do not consider these inconsistencies to be the result of his purported language barrier. Although Claimant used an interpreter at the formal hearing, his co-workers testified he was able to communicate to them in English. He was even promoted to leader man, which was a supervisory position requiring him to communicate with co-workers in English. Claimant performed this job satisfactorily and was only demoted through a reduction in force at Employer's facilities. Additionally, I am not entirely persuaded that these contradictions were the result of an inability to remember details from the past; these issues are major components of the current claim and one would expect Claimant to remember them clearly as only two years have passed between the accident and the formal hearing.

In reviewing the record, I note Claimant changed his accounts of the accident itself as well as his symptoms immediately following his accident, and he did so on multiple occasions. Regarding the accident itself, Claimant testified at the hearing that when his sleeve caught on the board, he was pulled up off the ground and then lost his balance and fell backward, hitting the angle iron. However, Claimant told his employer his forearm was pinched and the accident report, which Claimant signed to verify its accuracy, only noted he jammed his forearm. Similarly, no fact witness stated Claimant was lifted off the ground or fell backwards. In his claim for benefits filed July 28, 2003, Claimant first stated he fell, hitting his whole body against the angle iron causing his glasses and hard

hat to fall off. Claimant did not tell his doctors he fell during the accident until August 2003 when he treated with Dr. Pham. He told Dr. Steck that he struck his upper back in the accident.

Claimant was similarly inconsistent in describing his symptoms following the accident. There is nothing in the record to support Claimant's assertion that he told his supervisor that his arm went numb after the accident. Rather, he only reported minor forearm scratches for which he received first aid. Claimant also testified Dr. Kotler released him to light duty, but that was not consistent with Dr. Kotler's medical records indicating Claimant was able to perform his regular, full duty job. Finally, Claimant also testified he did not seek subsequent employment following his termination, but then stated he applied for a security guard position and with employers in the Vietnamese community but was not hired.

The above discussion of Claimant's shifting account of what happened on March 26, 2003, leads me to believe that Claimant is not a trustworthy or honest witness; the veracity of his testimony at the hearing is not reliable and thus Claimant should not be credited.

Dr. Pham's testimony is similarly suspicious, particularly in light of the large amount of money Claimant owes him for the treatment rendered following Claimant's accident. As such, it is evident Dr. Pham has a personal interest in establishing causation in the present case. Additionally, I note Dr. Pham, a chiropractor, diagnosed Claimant with cervical nerve root irritation. Despite the fact he does not hold a medical degree he refused to defer to the opinions of neurosurgeons or orthopedic surgeons as to Claimant's medical condition. I further note Dr. Pham was not aware of important facts surrounding Claimant's accident, such as the date; he testified that pursuant to Dr. Nguyen's note Claimant's neck pain did not start until four months after the accident he could not relate said pain to the accident. Dr. Pham also testified he never treated Claimant for pain on his right side, despite his report that Claimant presented to him with right wrist pain prior to the accident; Dr. Pham finally conceded he treated Claimant for right wrist pain. Finally, Dr. Pham testified he never opined as to Claimant's ability to work, yet in his note of December 29, 2003, he released Claimant to light duty work with pushing, pulling, lifting and carrying less than 10 pounds and frequent bending, squatting and stooping.

In all, I find the veracity of Dr. Pham's testimony to be suspect and questionable, at best. I certainly do not credit his opinions as to Claimant's physical condition over those of Drs. Kotler, Jaffri and Steck who all possess

medical degrees, whereas Dr. Pham's specialty is chiropractic services. In light of his monetary interest in this case, I do not credit his testimony in the absence of corroborating and consistent evidence in the record.

C. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d)(2000). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994) (emphasis added).

(1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary. . .
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287

(5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury arose out of employment. *Hunter*, 227 F.3d at 287. However, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

(1)(a) Existence of Physical Harm or Pain

To show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C.Cir. 1968); *Southern Stevedoring Corp., v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978).

In the present case, it is not contested that Claimant suffered minor injuries to his right forearm and hand, including scrapes and scratches. Dr. Kotler diagnosed Claimant with an injury to his right wrist on March 27, 2003. On April 3, Dr. George added that Claimant suffered medical epicondylitis with cubital tunnel syndrome and MP joint strain of the index finger. Claimant's hand was markedly improved by April 21, but Dr. George noted Claimant had continued paresthesis of the cubital tunnel. However, an EMG/NCS performed April 29 was negative for entrapment neuropathy.

On June 12, 2003, one and one-half months following the accident, Dr. George noted a diminished response of Claimant's ulnar nerve and follow up EMG/NCS revealed acute radiculopathy at C6-7. This finding was corroborated by Dr. Jaffri, a neurologist and electromyographer; Dr. George, a hand surgeon; and Dr. Kotlar, a general physician. Claimant exhibited signs of paresthesis into his hands, but he did not complain of neck pain until his July 25, 2003 treatment with Dr. Nguyen. A cervical MRI taken on April 12, 2004, at the direction of neurosurgeon John Steck revealed bulges in Claimant's cervical spine with stenosis at C5-6, but no disc herniation which would have caused his radiculopathy. Dr. Steck noted Claimant did not have a significant spinal injury and did not require further treatment of same.

I find the medical evidence, as well as the fact witnesses who testified Claimant pinched and cut his right wrist in the accident, support the claim that Claimant experienced a minor harm to his right forearm, as Employer concedes. It additionally supports a finding that Claimant suffers a harm of some sort in his cervical spine. Thus, he has satisfied the first prong of the Section 20(a) presumption.

(1)(b) Establishing that an Accident Occurred in the Course of Employment, or that Conditions Existed at Work, Which Could Have Caused the Harm or Pain

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a "mere fancy or wisp of 'what might have been.'" *Wheatley*, 407 F.2d at 313. A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990)(finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980)(same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999)(unpub.)(upholding ALJ ruling that the claimant did not produce credible evidence a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976)(finding the claimant's uncorroborated testimony on causation not worthy of belief).

In the present case, Employer does not dispute Claimant suffered an accident on March 26, 2003, in which he pinched his right forearm and suffered minor scrapes and scratches to same. This is stipulated to, and not currently an issue in this decision and order.

The accident report filled out by Mr. Galiano and signed by Claimant stated that Claimant's sleeve got caught on the scaffold board, pinching his right arm between the board and the wall. Mr. Galiano and Mr. Moody both verified this summary, testifying that Claimant only complained to them of injuries to his right

forearm. Mr. Ward, who witnessed the accident, issued a written statement which indicated Claimant jammed his arm against the angle iron in the accident. (CX-5).

Claimant told Dr. Kotler he pinched his right arm in the accident, though on April 3, 2003, Dr. George noted Claimant "jerked back" in the incident. However, Claimant only told Dr. Nguyen he injured his arm in the work accident. When Claimant first treated with Dr. Pham in August 2003, he stated that he experienced a falling accident at work; it was not until October 13, 2003, that Claimant told Dr. Pham he fell backwards and struck his neck on the angle iron. Claimant told Dr. Steck on March 4, 2004, that he fell backwards and struck his upper back on the side of the barge. These descriptions of the accident which include Claimant falling backward and hitting various parts of his body are wholly inconsistent with the accident report, fact witnesses and Claimant's own statements to his doctors in the weeks and months immediately following his injury. Thus, as stated above, I do not find them to be a credible account of his work accident.

Additionally, Mr. Moody and Mr. Galiano both testified Claimant did not inform them of pain and numbness throughout his right arm, shoulder and neck on the day of the accident. These symptoms were not included in the accident report, and Claimant did not originally describe pain or numbness in his neck and right arm to Dr. Kotler. I note that on Claimant's second visit to Dr. Kotler he complained of numbness in his arm. Nonetheless, when Claimant visited Dr. Nguyen on July 25, 2003, he stated his neck pain only started two days beforehand. Even Dr. Pham, Claimant's choice of chiropractor, testified he could not relate Claimant's neck pain to his accident given the four months that had lapsed in between the two. Finally, Dr. Steck, the only neurosurgeon to evaluate Claimant, noted that his cervical MRI did not show any abnormalities which would cause his current complaints of radiculopathy.

In light of the foregoing discussion, I find Claimant did not suffer an injury to his neck as a result of his March 26, 2003 work accident. I previously found Claimant to be an incredible witness, and this is highlighted here, where he changed the description of his accident within the months following the incident. He does not indicate he fell at all until July 28, 2003, when he filed his LS-203 which is inconsistent with the remainder of the record to that date. Moreover, his symptoms are not consistent with the initial description of his accident.

As such, I find that an accident did not occur at Claimant's work which could have caused his current neck pain. It stands that Claimant has failed to satisfy the second prong of the Section 20(a) presumption, and he has not

established a *prima facie* case for causation. Alternatively, assuming Claimant had invoked the presumption, Employer presented sufficient evidence to rebut the same, and the totality of the record would favor the same result, as is discussed below.

(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). To rebut the presumption of causation, the employer is required to present *substantial evidence* that the injury was not caused by the employment. *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). The Fifth Circuit described *substantial evidence* as a minimal requirement; it is "more than a modicum but less than a preponderance." *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003), *cert. denied*, 124 S.Ct. 825 (2003). The court went on to state an employer does not have to rule out the possibility the injury is work-related, nor does it have to present evidence unequivocally or affirmatively stating an injury is not work-related. "To place a higher standard on the employer is contrary to statute and case law." *Id.* at 289-90 (*citing Conoco, Inc.,* 194 F.3d at 690). *See Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983)(stating the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

In the present case, assuming Claimant satisfied the Section 20(a) presumption, I find Employer has admitted evidence to controvert the same. Dr. Steck, the agreed-upon neurosurgeon who evaluated Claimant in 2004, opined Claimant suffered no cervical disc herniations which caused his radiculopathy. Rather, he noted signs of cervical disc bulging and stenosis he described as degenerative in nature. This is consistent with, and supported by, Claimant's prior complaints of neck pain to Dr. Vu and Dr. Pham in the years before his 2003 accident. I find that this constitutes credible, substantial evidence that Claimant does not currently suffer a harm to his neck related to his current complaints of radiculopathy.

Additionally, Employer presented two fact witnesses who contradicted Claimant's assertion that he fell back and hit his back or neck in the course of the accident. Claimant's witness, Mr. Ward, did not describe the accident as a fall. Rather, the credible testimony at the hearing established only that Claimant pinched or jammed his hand and forearm. Even Claimant's chiropractor, Dr. Pham, could not relate his neck injury to his accident four month earlier. I find this to be substantial evidence that Claimant did not experience an accident at work which could have caused his cervical abnormalities, and Employer has rebutted the presumption.

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co.*, 227 F.3d at 288; *Holmes*, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281 (emphasis added).

In light of the above analysis and the fact I have declared Claimant to be an incredible witness, I find the preponderance of the credible evidence supports Employer and does not support Claimant's assertion of work-place neck or back injuries. Even if Claimant had managed to present credible evidence equal to that presented by Employer, he would ultimately fail as the Supreme Court rejected the "true doubt" rule in *Greenwich Collieries, supra.* Thus, I find Claimant's neck injury is not causally related to his March 26, 2003 accident at work.

D. Nature and Extent of Claimant's Disability

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by the nature (permanent or temporary) and the extent (total or partial). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI); this is a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985).

Here, the only injury Claimant sustained as a result of the March 26, 2003 accident was a minor injury to his right forearm. He treated with Dr. Kotler and Dr. George for this injury and on April 21, 2003, Dr. George noted Claimant's hand was "markedly improved." (EX-8). I note that Claimant did not receive any further medical treatment for his hand after April 21, 2003. Rather, the remainder of his medical treatment focused on his neck and shoulder, which has been determined to be not causally related to the accident. As such, I find Claimant reach MMI on April 21, 2003, pursuant to Dr. George's opinion and his temporary injury became permanent as of that date.

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former Longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co., v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

In the present case, no doctor ever restricted Claimant's ability to return to his work as a fitter/welder for Employer. Specifically, Dr. Kotler and Dr. George both affirmatively stated Claimant could return to work without restrictions, even despite his hand and unrelated neck injuries. Dr. Steck also noted in 2004 that Claimant did not need any restrictions for work. The only work restriction assigned to Claimant was from Dr. Pham on December 29, 2003. Dr. Pham indicated Claimant could only perform light duty work with lifting, carrying, pushing and pulling not to exceed 10 pounds. However, I have previously discredited Dr. Pham as a witness in the present case. At the formal hearing Dr. Pham specifically testified he never opined as to Claimant's ability to work, thus contradicting his own medical records. Even if this opinion was sufficient to establish a *prima facie* case of total disability, Employer more than rebutted it with

the three credible physicians who consistently and repeatedly released Claimant to his regular duty work without restriction.

Additionally, though Claimant testified he worked light duty from March 27 through August 6, 2003, there is no indication of this in Employer's records; even Mr. Galiano credibly testified he noticed no difference in Claimant the day after the accident. If I were to credit Claimant's testimony he worked as a fire watchman following the accident, his description of this job clearly fit within the only restriction placed on his ability to work the previously discredited opinion by Dr. Pham that Claimant should do no more than light duty work.

Thus, I find Claimant has failed to establish he could not work as a welder/fitter following his March 26, 2003 accident. Rather, the evidence is clear that he could return to his normal job earning his normal wages, and therefore he has suffered no economic loss and in turn, no disability. I therefore maintain that Claimant suffers no work-related disability and is not entitled to receive disability benefits.

D. Medical Benefits

Section 7(a) of the Act provides "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). However, under § 7(d)(1), an employee is not entitled to reimbursement for medical treatment or services unless:

> (A) his employer refused or neglected to provide them and the employee has complied with subsections (b) and (c) and the applicable regulations, or
>
> (B) the nature of the injury required the treatment and services and, although his employer . . . knew of the injury, [it] neglected to provide or authorize them.

The parties stipulated that Employer paid for Claimant's medical bills related to his hand injury; specifically those incurred by Dr. Kotler, Dr. Jaffri, Dr. George and Dr. Steck. These treatments are not at issue in the present case.

As Claimant's neck injury was not found to be causally related to his work accident, Claimant is not entitled to Section 7 medical benefits for any treatment

rendered in connection thereto. Specifically, Claimant is not entitled to benefits for the treatment he received from Dr. Nguyen, Dr. Pham or Charity Hospital. Even if Claimant's neck injury was causally related, he would nonetheless be denied medical benefits for these treatments as there is no indication he sought Employer's authorization for medical treatment prior to seeing any of these doctors, as is required by § 7(d) of the Act.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following order:

Claimant's petition for benefits under the Act is denied because Claimant failed to establish a causal relationship between his employment and his neck injury. The preponderance of the credible evidence shows that Claimant's condition was not caused or aggravated by a work injury or his working conditions. The only injury he sustained on March 26, 2003, was to his hand and forearm, which was fully resolved and compensated for prior to the formal hearing. Claimant has not proven additional injury or that he is entitled to disability and medical benefits therefore. As such, his claim shall be **DENIED.**

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE